

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MICHAEL P. ROMEO, SR.**

Claimant

VS.

**GENERAL MOTORS, LLC**

Self-Insured Respondent

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Docket No. 1,060,489

**ORDER**

Claimant requested review of the December 13, 2012, Award by Administrative Law Judge (ALJ) William G. Belden. The Board heard oral argument on April 19, 2013.

**APPEARANCES**

Zachary A. Kolich, of Shawnee Mission, Kansas, appeared for the claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found claimant suffered compensable personal injuries consisting of contusions, abrasions and strain/sprains of the right leg and right arm and shoulder from the accident of September 29, 2011. The ALJ found the accident of September 29, 2011, merely aggravated the chondromalacia and degenerative pathology of the right knee, and was not the prevailing factor in the right knee pathology. He concluded this condition is not compensable under the Workers Compensation Act. He also found the accident, at most, only aggravated the pathologies in the right shoulder that Dr. Paul treated surgically, and was not the prevailing factor causing the medical condition. The Court concluded the right shoulder pathology treated by Dr. Paul is not compensable under the Workers Compensation Act. The ALJ found the opinion of Dr. Clymer, coupled with the contemporaneous treatment records, to be more credible than the opinions of Dr. Zimmerman.

The ALJ went on to find that claimant provided timely notice of his injuries to respondent, but failed to meet his burden of proving, by a greater weight of the credible evidence, the compensable contusions, abrasions and strain/sprains of the right leg, right arm and shoulder resulted in permanent impairment. Claimant did not meet his burden of proving the work-related accident was the prevailing factor in any resulting impairment or disability, and the ALJ awarded no permanent partial disability compensation under K.S.A. 2011 Supp. 44-510d.

Finally, the ALJ found claimant did not meet his burden of presenting medical evidence that it is more probably true than not that additional medical treatment for the contusions, abrasions and strain/sprains of the right leg, right arm and shoulder will be necessary. Accordingly, the request for future medical treatment was denied. Respondent was ordered to pay all valid, authorized and related medical that has been incurred to cure or to relieve the effects of the work-related injuries, directly to the providers pursuant to the Kansas Workers Compensation Medical Fee Schedule. The unauthorized medical allowance of up to \$500.00 was awarded and left open, subject to future payment either by agreement of the parties or upon application and hearing before the Director. Future medical treatment was denied.

The claimant requests review of the nature and extent of disability; whether the ALJ erred in his calculation of compensation due as a result of the work-related injuries; and whether claimant is entitled to future medical. Claimant contends he has proven that it is more probably true than not that he will require medical treatment related to injuries that should be determined to be compensable. Claimant further contends that he has met the statutory requirements and burden of proving he will more than likely require some qualifying form of medical treatment that is the result of any one of a number of his various work-related injuries.

Respondent argues the Award should be affirmed on all issues, as the ALJ correctly found the workplace incident was not the prevailing factor causing claimant's injury, medical condition, and resulting disability relative to both the right shoulder and right knee. Respondent also argues the ALJ correctly determined that claimant failed to prove any permanent partial impairment or need for future medical treatment directly related to the workplace incident.

Finally, claimant contends K.S.A. Chapter 44, as amended May 15, 2011, is unconstitutional. Claimant and the Board acknowledge the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. This issue will not be ruled upon by the Board, but it will be preserved for future determination when presented to a proper court.

**FINDINGS OF FACT**

Claimant has worked for the General Motors plant since 1985 as a millwright welder. On September 29, 2011, he was working at the plant in Kansas City, Kansas, when a robot broke down and claimant responded to the call. He took a step to the side to get a better view of the robot and fell in a hole which went down just below his knee. Claimant fell pretty hard and landed on his right elbow. Claimant's head also struck the ground. However, he was wearing a hard hat. After the accident, claimant noticed symptoms in his right shoulder and right knee, with bleeding behind his right knee. Claimant reported the accident to his supervisor Jim Dedert. Claimant was given an accident report form to fill out and was sent to the plant medical facility. Claimant was bandaged and was sent in a cab to Providence Hospital for x-rays. Claimant underwent a Doppler test to make sure there was no arterial damage in his leg. He was also sent for MRIs of the right shoulder and right knee.

Claimant was provided treatment with Dr. Robert Paul, who ultimately performed surgery on claimant's right shoulder and gave claimant injections in the right knee. Claimant missed one week of work and then returned to work on light duty until he was released from care. While performing the surgery on claimant's right shoulder, Dr. Paul noted his findings were not particularly consistent with the MRI study. In particular, the shoulder labrum was overall intact with no evidence of a significant grade III SLAP lesion or rotator cuff tear.

Claimant continues to work for respondent as a millwright welder. This job requires lifting of anywhere from 5 to 200 pounds. He does not obtain assistance for the heavy lifting. Claimant reports he currently has trouble moving his right shoulder and has a lot of pain while trying to sleep. He is also unable to retrieve tools or his wallet from his back pocket. He complains of having difficulty gripping. Claimant rated his shoulder pain on a typical day at an 8 out of 10. When the pain increases he rates it at a 10. In regard to his right knee, claimant testified to having sharp pain from the side when he squats or kneels with the pain at 10 out of 10.

Claimant had a prior workers compensation claim for his left shoulder, for which he received a settlement. He had surgery on the left shoulder. He denies any prior problems with the right shoulder or right knee. Claimant had prior, non-work-related, back surgery three years ago.

At the request of his attorney, claimant met with board certified independent medical examiner Daniel D. Zimmerman, M.D., on May 22, 2012, for an examination. Claimant's chief complaint at the time of the evaluation was pain and discomfort in the right shoulder and right knee. Claimant was unable to raise his shoulder above shoulder height and had decreased strength in his right arm. He also reported numbness and tingling in his right arm if he lies on his right side or rolls over onto the right side during the night. Claimant reported right knee pain when he squats and experiences an inability to bend his right

knee. He was able to stoop without pain or discomfort. He had pain in his knee when going up and down stairs.

Dr. Zimmerman noted claimant's September 29, 2011, right shoulder and right knee injury and the treatment he received with Robert F. Paul, D.O. He noted that x-rays of claimant's right knee performed on September 29, 2011 showed minimal patellofemoral joint degenerative changes and mild spurring of the margins of the articular surface of the patella. There was no fracture or dislocation of the right shoulder.

Dr. Zimmerman also reviewed records from claimant's examination with Dr. Paul on December 15, 2011. At that time claimant was sent for MRI scans of the right shoulder and right knee. The October 4, 2011, MRI of the shoulder indicated a grade III SLAP lesion and degenerative changes. The MRI of the right knee demonstrated chondromalacia patella in the medial compartment. Claimant had surgery on the right shoulder and an injection in the right knee on January 23, 2012. Dr. Paul determined that the majority of claimant's shoulder issues stemmed from degenerative joint disease as claimant had grade IV chondral changes diffusely about the humeral head and a more focal defect centrally in the glenoid.<sup>1</sup> Claimant was off work for one week before returning to light duty and then regular duty. The injection in claimant's knee provided some improvement. Dr. Paul memorialized in an office note dated February 9, 2012, that claimant was advised to begin passive and active range of motion of the shoulder and hopefully full range of motion would be possible after three weeks.

When Dr. Zimmerman met with claimant on May 22, 2012, claimant had range of motion deficits affecting the right shoulder and weakness, pain and discomfort to palpation about the right shoulder. Claimant also had reduced range of motion affecting the right knee. Dr. Zimmerman ordered plain film x-rays of the right shoulder, which revealed osteoarthritic changes affecting the acromioclavicular joint and chondromalacia patella of the right knee.

Dr. Zimmerman opined claimant's condition was stable and no further diagnostic or therapeutic intervention was warranted. Claimant was found to be at maximum medical improvement. Dr. Zimmerman noted that claimant was taking Tylenol 3 and Hydrocodone for pain affecting the lumbosacral spine and told claimant he could continue with that for the shoulder and knee pain. Claimant was also told to self treat with hot baths, showers, and heating pads.

On June 16, 2012, Dr. Zimmerman assigned to claimant a 23 percent permanent partial impairment of the right upper extremity at shoulder level, due to the SLAP tear of the right shoulder, which converts to a 14 percent whole person impairment, and a 20 percent permanent partial impairment of the right lower extremity at knee level, which

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<sup>1</sup> Zimmerman Depo. at 54.

converts to an 8 percent whole person impairment. He then combined the impairments for a 21 percent whole person permanent partial impairment. Dr. Zimmerman opined that the prevailing factor for the right shoulder SLAP tear and the permanent aggravation of chondromalacia patella affecting the right knee is the accident that occurred on September 29, 2011, while claimant was working for respondent. Dr. Zimmerman was unable to say if claimant's chondromalacia was preexisting. But, if it was, it was asymptomatic, becoming symptomatic at the time of the accident. Dr. Zimmerman later testified that the prevailing factor affecting the right knee was actually chondromalacia change. He agreed, at the time of his deposition, that claimant didn't have a SLAP tear in the shoulder, but had fraying of the SLAP cartilages.<sup>2</sup> It was still his opinion that claimant's condition was aggravated by the fall. He chose not to modify his impairment rating to the shoulder, even after being advised that claimant did not suffer a SLAP tear in the shoulder.

Dr. Zimmerman opined that claimant will be in need of future medical treatment, testifying:

. . . considering his severe range of motion restrictions and pain and discomfort, as well as weakness, that ultimately at some point he may be a candidate for a total shoulder joint replacement. Certainly injections of steroid and local anesthetic and the use of nonsteroidal anti-inflammatory medication might be warranted. He's also taking narcotic medication for a back condition, so the narcotic medications would certainly help with shoulder pain as well.

With reference to the knee, he had significant pathology there. He could be a candidate for diagnostic arthroscopies and/or interventions at a later date. Certainly use of nonsteroidals and injections of steroid and local anesthetic and visco supplementation products might be needed as well.<sup>3</sup>

At respondent's request, claimant met with board certified orthopedic surgeon David J. Clymer, M.D., on September 10, 2012, for an evaluation of his right shoulder and right knee. Dr. Clymer noted that, despite claimant's prior medical problem of bilateral carpal tunnel disease and left shoulder surgery, he had been functioning well without significant new symptoms up to the time of his work-related fall on September 29, 2011.

Claimant presented to Dr. Clymer with stiffness and discomfort in his right shoulder and pain involving the anterior aspect of the right knee. X-rays of the right shoulder showed very minor joint space narrowing at the glenohumeral joint and slight degenerative changes at the acromioclavicular joint. X-rays of the right knee showed good joint space medially and laterally; some interarticular calcification consistent with mild chondral calcinosis; narrowed joint space at the patellofemoral articulation and mild spurring at the

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<sup>2</sup> Zimmerman Depo. at 50.

<sup>3</sup> Zimmerman Depo. at 30-31.

upper and lower pole of the patella consistent with degenerative chondromalacia in the region.

Dr. Clymer opined that claimant probably did have some degenerative arthritis involving the right shoulder and right knee which preexisted the work accident. He memorialized that the work accident probably resulted in a rather severe contusion to the right knee and probably caused some aggravation and progression in the degenerative patellofemoral chondromalacia involving the right knee. This knee contusion resulted in some increase in claimant's sense of discomfort and crepitus. Based on his findings, Dr. Clymer found the work accident caused a 5 percent impairment to the right lower extremity at the knee, based on the 4th edition of the *AMA Guides*.<sup>4</sup>

Dr. Clymer opined that the majority of claimant's shoulder symptoms are related to preexisting degenerative problems, but felt there was some progression in the process related to the fall at work. He went on to assign a 5 percent impairment to the right upper extremity impairment at the shoulder, based on the 4th edition of the *AMA Guides*. He felt claimant was able to function without specific restrictions.

Dr. Clymer diagnosed claimant with sprains, strains and contusions as a result of the fall at work. He wrote that most of claimant's shoulder damage was the result of preexisting degenerative arthritis with cartilage surface wear on the humeral head and glenoid. He noted some preexisting degenerative spurring at the undersurface of the acromion and distal clavicle and, although claimant's problems were clearly preexisting, the work accident resulted in some additional aggravation with some progression in the chondromalacia and aggravation or annoyance of the labral damage as well as some simple joint sprain or contusion.

Dr. Clymer opined that claimant will most probably require some additional treatment in the future as claimant has a significant arthritic shoulder joint. He also opined that claimant was going to have some ongoing shoulder symptoms of stiffness and discomfort that might benefit from some occasional injections or arthritis medications and maybe even surgery in the future.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup>

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<sup>4</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>5</sup> K.S.A. 2011 Supp. 44-501b and K.S.A. 2011 Supp. 44-508(h).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>6</sup>

K.S.A. 2011 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(2)(B) states:

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

There is no question that claimant's fall on September 29, 2011, stemmed from the work claimant was required to perform for respondent. The evidence supports a finding that both the injury and resulting medical conditions involving the sprains, strains and contusions of the right shoulder and right knee stemmed from that fall.

However, the more difficult question is whether the accident is the prevailing factor causing the resulting impairment and/or permanent disability to the knee and shoulder. Dr. Zimmerman rated claimant's shoulder at 23 percent of the upper extremity, citing the finding of a right shoulder SLAP tear as justification. However, when informed that claimant didn't actually suffer a SLAP tear in the shoulder, he continued with the 23 percent upper extremity rating. He also opined that claimant suffered a 20 percent permanent extremity to the right lower extremity as the result of the fall. But, on cross

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<sup>6</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

examination, he admitted that the prevailing factor affecting the right knee was actually the chondromalacia change. The legitimacy of Dr. Zimmerman's impairment opinions is questioned by the Board and found to be lacking.

Dr. Clymer rated claimant at 5 percent to both the right shoulder and right knee. But he acknowledged the majority of claimant's symptoms are related to the preexisting degenerative changes suffered by claimant. He was not willing to state the prevailing factor leading to his impairment opinions was the fall on September 29, 2011.

The ALJ found, and the Board affirms, that the accident of September 29, 2011, at most, only resulted in temporary sprains, strains and contusions in the right shoulder and right knee and was not the prevailing factor in any resulting permanent impairment or disability. The Award of the ALJ is affirmed.

#### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove that the fall on September 29, 2011, was the prevailing factor causing any permanent impairment in claimant's right shoulder or right knee. The award of valid, authorized and related medical treatment as well as the unauthorized medical allowance of up to \$500.00 as noted in the Award, is affirmed.

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge William G. Belden dated December 13, 2012, is affirmed.



**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Zachary A. Kolich, Attorney for Claimant  
zak@mrwallaw.com

Frederick J. Greenbaum, Attorney for Self-Insured Respondent  
mvpkc@mvplaw.com  
fgreenbaum@mvplaw.com

William G. Belden, Administrative Law Judge